

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 2, 2004

IN RE:)	
)	
WORKSHOP TO GATHER INFORMATION)	DOCKET NO.
FROM THE TELECOMMUNICATIONS)	03-00502
INDUSTRY RELATED TO PREVENTING)	
VIOLATIONS OF TENN. CODE ANN. § 65-21-114)	

ORDER APPROVING REPORT AND RECOMMENDATION

This matter came before Director Pat Miller, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "TRA" or "Authority"), the voting panel assigned to this Docket, at the January 26, 2004 Authority Conference for consideration of the *Report on Workshop Meeting Held on November 7, 2003 and Recommendation of Moderator* ("Report and Recommendation"), attached hereto, without supporting documentation, as Exhibit A.

Background

On June 30, 2003, Citizens Telecommunications Company of Tennessee ("Citizens") filed Tariff No. 2003-593 in TRA Docket No. 03-00411. During the July 7, 2003 Authority Conference, concerns were raised regarding the compliance of this tariff with the county-wide calling requirements of Tenn. Code Ann. § 65-21-114, which reads as follows:

(a) Any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll-free and shall not be billed to any customer.

(b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee regulatory authority. However, this

section does not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.

(c) Nothing in this section is intended to modify or repeal the rate-making and telephone regulatory authority of the authority or the right of telephone companies to earn a fair rate of return.

Because of these concerns, the panel voted unanimously to suspend the tariff for thirty days and directed Citizens to meet with TRA Staff to make any necessary revisions to the tariff. As a result of this effort, Citizens filed a revised tariff with the TRA on July 30, 2003.

During the August 4, 2003 Authority Conference, the panel determined that the revised tariff did not fully assuage their concerns regarding compliance with Tenn. Code Ann. § 65-21-114 and unanimously decided to open a docket for the purpose of conducting a workshop to gather information and input from the telecommunications industry related to preventing violations of Tenn. Code Ann. § 65-21-114. For this purpose, the panel appointed Director Jones as moderator of the workshop and directed him to file a report on the status of the workshop within one hundred and twenty days. Thereafter, TRA Docket No. 03-00502 was opened. Director Jones held the workshop on Friday, November 7, 2003 and filed the *Report and Recommendation* in Docket No. 03-00502 on December 5, 2003.

January 26, 2004 Authority Conference

At the January 26, 2004 Authority Conference, Director Jones, as the Moderator of the Workshop, requested that the panel approve the *Report and Recommendation*, advocating further action by the TRA to address concerns regarding county-wide calling since the Authority continues to receive complaints regarding this issue. To this end, Director Jones

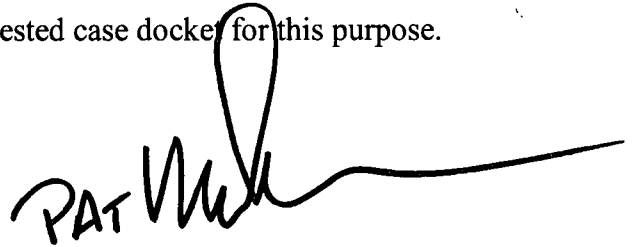
shared with the panel his two primary recommendations resulting from the Workshop. First, Director Jones recommended that the TRA open a rulemaking docket for the purpose of establishing a mechanism and related regulations to ensure compliance with Tenn. Code Ann. § 65-21-114. In furtherance of this objective, Director Jones also recommended that TRA Staff draft proposed rules consistent with the *Report and Recommendation* and that such rules be published in accordance with the requirements of Tenn. Code Ann. § 4-5-203(c) within sixty days of adoption of the *Report and Recommendation* by the voting Panel.

Second, Director Jones recommended that the TRA open a contested case docket for the purpose of determining whether toll carriers receive reasonable remuneration when terminating intra-county calls outside the originating caller's local calling area. Director Jones also recommended that any carrier wishing to participate in this contested case docket file a petition to intervene, addressing the carrier's position on reasonable remuneration, within fourteen days of adoption of the *Report and Recommendation* by the voting Panel.

In response to these recommendations, Director Miller raised the public policy implications of Tenn. Code Ann. § 65-21-114, suggesting legislative intent that the citizens of this State be able to call any other citizen within the same county without any additional charge. Because neither the TRA nor any court of competent jurisdiction in this State has found the statute to be invalid, Director Miller stated that any company failing to terminate a call in compliance with this statute would have to answer to the TRA. For these reasons, Director Miller proposed an amendment to the motion of Director Jones to the effect that the opening of a contested case docket be addressed by the panel only if a need should arise during the course of the rulemaking proceeding. Thereafter, the panel voted unanimously to approve the motion of Director Jones as subsequently amended.

IT IS THEREFORE ORDERED THAT:

1. The *Report and Recommendation*, attached hereto as Exhibit A, is accepted and approved and is incorporated into this Order as if fully rewritten herein.¹
2. A rulemaking proceeding shall be opened for the purpose of establishing a mechanism and related regulations to ensure compliance with Tenn. Code Ann. § 65-21-114.
3. TRA Staff shall draft proposed rules consistent with the *Report and Recommendation* and publish such rules in accordance with the requirements of Tenn. Code Ann. § 4-5-203(c) within sixty days of adoption of the *Report and Recommendation* by the voting panel.
4. Should the need arise during the course of the rulemaking proceeding to address reasonable remuneration when terminating intra-county calls outside the originating caller's local calling area, the panel will consider opening a contested case docket for this purpose.



Pat Miller, Director



Sara Kyle, Director



Ron Jones, Director

¹ During the January 26, 2004 Authority Conference, Director Ron Jones corrected Footnote 46 of the *Report and Recommendation* to reference Tab 21 instead of Tab 20

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 5, 2003

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T.R.A. DOCKET ROOM

IN RE:

WORKSHOP TO GATHER
INFORMATION FROM THE
TELECOMMUNICATIONS INDUSTRY
RELATED TO PREVENTING
VIOLATIONS OF TENN. CODE ANN.
§ 65-21-114

DOCKET NO.
03-00502

REPORT ON WORKSHOP MEETING HELD NOVEMBER 7, 2003 AND
RECOMMENDATION OF MODERATOR

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EXHIBIT

A

90-02094, <i>Order</i> (Mar. 30, 1990); <i>In re: Metro Area Calling for Millington Telephone Company, Inc.</i> , Docket No. 90-04321, <i>Order</i> (Jun. 20, 1990); <i>In re: Petition of Concord Telephone Exchange, Inc. to Change and Increase Certain Intrastate Rates and Charges so as to Permit It to Earn a Fair and Adequate Rate of Return on Its Property Used and Useful in Furnishing Telephone Service to Its Customers in Tennessee (Implementation of Metropolitan Area Calling Plan for the Knoxville Area)</i> , Docket No. 89-11700, <i>Order</i> (Jul. 17, 1990)	TAB 2
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I. PROCEDURAL HISTORY OF COUNTY-WIDE CALLING

On January 6, 1988, the Tennessee Public Service Commission ("Commission") issued an order in Docket No. U-88-7547 directing South Central Bell Telephone Company ("SCB") to reduce its annual intrastate revenues by 35.4 million dollars. The Commission explained that the revenue reductions would be used, in part, to "reduce toll rates and zone charges and generally to extend local calling areas across the state."¹

In Docket No. U-88-7588, the Commission ordered Ardmore, Claiborne, Crockett, GTE South, Ooltewah-Collegedale, Peoples, and West Tennessee Telephone Companies to provide county seat calling² within their service areas on or before November 1, 1988.³ In this order, the Commission found that county seat calling in the areas served by the carriers is in the public interest and noted that each of the providers had agreed to implement county seat calling without a hearing or an increase in rates at that time.⁴

On November 15, 1988, the Commission issued an order in Docket No. U-88-7596. The Commission found that SCB had filed tariffs pursuant to the January 6, 1988 Order in Docket

¹ *In re Commission Investigation of the Earnings Level of the South Central Bell Telephone Company*, Docket No. U-88-7547, *Order*, 2 (Jan 6, 1988) (attached hereto under **Tab 1**)

² County-seat calling is a service that provides for toll free calls to county government offices from any number within the same county. Also during this same time period, the Commission entered orders establishing Metro Area Calling ("MAC"). MAC expanded the local calling areas around Memphis, Knoxville, Chattanooga, and Nashville to include the entire county where the city is located and all adjacent counties. See *In re Investigation of Earnings of South Central Bell Telephone Company*, Docket No. U-88-7594, *Order* (Oct 17, 1988) (requiring that SCB offer MAC to its customers), *In re Tariff Filing by Alltel, Tennessee, Inc. to Increase Rates to Enable the Powell and Claxton Exchanges to Become Full Participants in the Knoxville Metropolitan Area Calling on March 31, 1990*, Docket No. 90-02094, *Order* (Mar 30, 1990) (approving rate increase to allow ALLTEL Tennessee, Inc. to participate in the Knoxville MAC), *In re Metro Area Calling for Millington Telephone Company, Inc.*, Docket No. 90-04321, *Order* (Jun 20, 1990) (implementing MAC for Millington Telephone Company Inc.'s Shelby, Tipton, and Fayette County customers), *In re Petition of Concord Telephone Exchange, Inc. to Change and Increase Certain Intrastate Rates and Charges so as to Permit It to Earn a Fair and Adequate Rate of Return on Its Property Used and Useful in Furnishing Telephone Service to Its Customers in Tennessee (Implementation of Metropolitan Area Calling Plan for the Knoxville Area)*, Docket No. 89-11700, *Order* (Jul 17, 1990) (approving rate changes to facilitate MAC in Knoxville) (all orders attached hereto under **Tab 2**).

³ See *In re County Seat Calling for Ardmore, Claiborne, Crockett, GTE South, Ooltewah-Collegedale, Peoples, and West Tennessee Telephone Companies*, Docket No. U-88-7588, *Order*, 2 (Oct 5, 1988) (attached hereto under **Tab 3**).

⁴ See *id.* at 1-2

No. U-88-7547 to effectuate county seat calling. The Commission next found that SCB could not implement the plan in all counties because of a prohibition in the AT&T consent decree preventing SCB from completing calls that crossed local access and transport area ("LATA") boundaries. According to the terms of the consent decree such calls must be completed by inter-exchange carriers ("IXCs").⁶ In recognition of this finding, the Commission requested IXCs transmit interLATA county seat calls without charge and permitted the local exchange carriers ("LECs") to amend their tariffs to waive access service charges on interLATA, intracounty seat calls when an IXC that carries the calls does not bill the subscriber for the calls. In addition, the Commission noted that the Meigs County and Decatur cross-LATA county seat situation could be remedied by seeking a modification of the LATA boundaries such that Decatur, Tennessee would be part of the Chattanooga LATA.⁷

On October 20, 1989, the Commission entered another order in Docket No. U-88-7596, which the Commission described as "the final step in the implementation of the County Seat Calling Plan ordered in Docket No. U-88-7547."⁸ In this order, the Commission mentioned that in its November 15, 1988 order it requested that SCB petition the federal district court to modify the LATA boundary established for Decatur, Tennessee. Finding that SCB petitioned the federal district court and received a favorable ruling, the Commission closed Docket No. U-88-7596.⁹

During the proceedings in Docket No. U-88-7596, the Commission also addressed Docket No. U-88-7592, In re: County Seat Calling for Alltel Telephone Company. In this

⁵ For the purposes of this respond, the terms "IXC" and "interLATA carrier" shall have the same meaning

⁶ See *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983), *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 141, 227 (D.D.C. 1982).

⁷ See *In re Implementation of County Seat Calling Plans for Calls Across LATA Boundaries*, Docket No. U-88-7596, Order, 1-2 (Nov. 15, 1988) (attached hereto under **Tab 4**). According to a footnote in the order, AT&T Communications of the South Central States, Inc. had agreed to the procedure outlined in the order. *Id.* at 1 n.*

⁸ See *In re Implementation of the County Seat Calling Plans for Calls Across LATA Boundaries*, Docket No. U-88-7596, Order, 1 (Oct. 20, 1989) (attached hereto under **Tab 5**).

⁹ See *Id.* at 1-2.

docket, the Commission approved an agreement between SCB and Alltel to provide toll-free calling in Grainger County effective January 30, 1989.¹⁰

As part of a SCB earnings investigation, the Commission issued an order on August 20, 1993 addressing county-wide calling. In the *Order*, the Commission stated:

The Commission finds that it is in the public interest t[o] complete county wide calling in Tennessee. To the extent tha[t] there are any counties where county wide calling without toll charges is not available, the Company will file tariffs to accomplish such county wide calling, and the funding required to provide such county wide calling will be drawn from the deferred revenue account.¹¹

On October 13, 1993, the Commission issued an *Order* in Docket No. 93-07799 finding that, based on the shared economic and social interests, subscribers “served by a local exchange telephone carrier regulated by the Commission should be able to make toll-free calls to other subscribers who live in the same county and are also served by a local company regulated by the Commission.”¹² After rejecting the option of further shifting LATA boundaries, the Commission determined the better method for achieving the desired result was to require interLATA carriers to provide toll-free, county-wide calling and to direct LECs not to charge access fees on intracounty, interLATA calls.¹³ Given this conclusion, the Commission directed certified, interLATA carriers providing intrastate service to customers in those counties dissected by

¹⁰ See *In re County Seat Calling for Alltel Telephone Company*, Docket No. U-88-7592, *Order* (Nov. 17, 1988) (attached hereto under **Tab 6**).

¹¹ *In re Earnings Investigation of South Central Bell Telephone Company, 1993-1995*, Docket No. 92-13527, and *In re Petition of BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company for Conditional Election of Regulation Pursuant to Chapter 1220-4-2-5 of the Tennessee Public Service Commission's Rules and Regulations*, Docket No. 93-00311, *Order*, 17 (Aug. 20, 1993) (attached hereto under **Tab 7**). In addition to county-wide calling, the Commission also ordered SCB to develop optional calling plans for calls within a 40-mile radius of the customer's serving wire center and to include Dickson County in the Metro Calling Area area for Nashville. See *id.* at 15, 18-19.

¹² See *In re Show Cause Proceeding Against Certified IXC's to Provide Toll Free, County-Wide Calling*, Docket No. 93-07799, *Order*, 1 (Oct. 13, 1993) (attached hereto under **Tab 8**).

¹³ See *id.* at 1-2.

LATA boundaries to show cause why they should not be required to provide toll-free, county-wide calling.¹⁴

At a pre-hearing conference on November 10, 1993, the Commission asked the Telecommunications Division to investigate which entities, IXC's or LEC's, should be responsible for providing toll-free, county-wide calling. On December 10, 1993, Austin H. Lyons, Director Telecommunications Division, filed a report addressing the question of "[s]hould the local exchange companies carry all intra-county calls including those which under current rules, would be routed through inter-exchange carriers."¹⁵ Mr. Lyons concluded that in order for interLATA county-wide calling to be provided by LEC's the LEC's must receive authority to provide service across LATA boundaries, routing of telephone calls must be changed, additional trunks are likely to be required, and billing changes must be made. If IXC's were to provide toll-free county-wide calling, Mr. Lyons concluded that billing changes would have to be made. Mr. Lyons further determined that the superior mechanism for offering toll-free county-wide calling is the mechanism which does not require changing the operations of the network. Based on these findings, Mr. Lyons concluded that IXC's should continue to carry interLATA county-wide traffic, but IXC's should be provided a period of time to effectuate billing changes.¹⁶

On March 2, 1994, Administrative Law Judge ("ALJ"), Mack H. Cherry convened the show cause hearing in Docket No. 93-07799. In his *Initial Order*, the Administrative Law Judge summarized the issue as follows:

¹⁴ See *Id* at 2. The counties dissected by LATA boundaries listed in an appendix to the *Order* are Claiborne, Cumberland, Greene, Hawkins, Marion, Meigs, Montgomery, Polk, Roane, McNairy, Obion, and Weakly. See *In re Show Cause Proceeding Against Certified IXC's to Provide Toll Free, County-Wide Calling*, Docket No. 93-07799, *Initial Order*, 4 (Mar. 31, 1994) (attached hereto under **Tab 9**). Henry County is also dissected by LATA boundaries. See Map of Tennessee LATA Boundaries (attached hereto under **Tab 10**).

¹⁵ Memorandum from Austin J. Lyons, Director Telecommunications Division, to Parties of Record Regarding Inter-LATA Toll-Free County-Wide Calling (Docket No. 93-07799), 2 (Dec. 10, 1993) (attached hereto under **Tab 11**).

¹⁶ See *id* at 12-13.

The focus of this decision should be clear. Indeed, L. G. Sather of AT&T acknowledged as much in his testimony. The Commission has directed that toll-free service to the areas in question will be provided. Whether it will be provided is not even an issue to be considered. The issue is how the toll-free service will be provided and which parties will provide it.¹⁷

The arguments of IXC's listed by the ALJ are summarized as follows:

- Toll-free calling is local in nature and LECs are better suited to provide this service.
- LECs are able to recover the costs associated with county-wide calling because LECs are rate-of-return regulated. Given the competitive interLATA environment, raising rates to recover costs is not an option for IXC's.
- SCB has obtained waivers of the LATA boundary requirements in the past.
- The cost of software to suppress the billing of intracounty- calls is too great.
- The call and credit method of billing creates customer dissatisfaction and complaints.
- The twice monthly updates of the Tax Authority Record ("TAR") Code Database promote complaints because customers move between counties during the two week period.
- Mileage bands are not appropriate for Tennessee because the counties are too large. Specifically, IXC's can not afford to give up the revenues generated from three bands of traffic.
- LECs' processes for crediting access charges are too slow.
- A rulemaking, not a show cause, is the appropriate proceeding through which to address this issue.¹⁸

The LECs' arguments were as follows:

- IXC's are already providing this service when providing toll-free county-seat calling.
- LECs contribute to the goal of providing county-wide calling by waiving access charges, the greatest expense of providing intracounty-, interLATA calls.
- There is uncertainty as to whether a waiver of the prohibition on providing interLATA calls could be obtained for all thirteen counties and the process of seeking such waivers would delay implementation of county-wide calling.
- The cost for LECs to provide county-wide calling would be too great because LECs would have to construct new facility routes and change software and telephone numbers.
- Use of new NXX codes for the new telephone numbers would accelerate the exhaust of the 615 area code.¹⁹

¹⁷ See *In re Show Cause Proceeding Against Certified IXC's to Provide Toll Free, County-Wide Calling*, Docket No 93-07799, Initial Order, 5 (Mar. 31, 1994) (attached hereto under **Tab 9**)

¹⁸ See *id.* at 5-8.

¹⁹ See *id.* at 8-9

The ALJ described the Staff's position in this case as the same as the LECs. Some of the points highlighted by the ALJ were:

- IXC's execution of county-seat calling proved their ability to perform.
- The process of obtaining a waiver of the prohibition on providing interLATA calls would take too much time.
- Handling of the intracounty-, interLATA calls by IXCs would require fewer changes to current customer service arrangements.²⁰

The ALJ concluded that IXCs had not shown cause why they should not be required to provide toll-free, intracounty, interLATA calls and ordered that "[a]ll IXCs providing intrastate service in Tennessee will provide interLATA intra-county calling toll-free to all Tennessee customers effective August 1, 1994."²¹ The ALJ further determined that all IXCs providing intrastate service in Tennessee should by no later than two years from the date of the Final Order zero rate intracounty, interLATA calls. Those IXCs that did not have the ability to zero rate calls at the time of the issuance of the *Initial Order* were given six months to file a waiver request based on the IXC's market share in the thirteen counties.²² Despite the zero rate requirement and the opportunity for a waiver, the ALJ required that all IXCs that did not have the ability to zero rate calls at the time of the issuance of the *Initial Order* comply with the Commission's directive through bill and credit calling.²³ To offset the cost to IXCs of providing county-wide calling, the ALJ directed the LECs to credit access charges associated with intracounty, interLATA calls. In reaching these conclusions, the ALJ made many important findings including:

- There was insufficient evidence in the record to determine whether South Central Bell Telephone Company could obtain a waiver of the prohibition on providing interLATA calls from the federal court.
- Although the cost to those IXCs that are not zero rating calls cannot be ignored the cost for LECs to provide the same service is greater.

²⁰ See *id.* at 10

²¹ *Id.* at 22

²² See *id.* at 22

²³ See *id.* at 12

- Requiring IXCs to provide the service would better serve customer convenience by helping to conserve numbers in the 615 area code.
- This Commission's requirement to provide county-wide calling is merely an extension of county-seat calling to which IXCs have not objected.
- Regardless of the label given to the service at issue, LECs can provide the service and IXCs cannot.
- The provisioning of intracounty, interLATA calls is not local service.
- Toll-free county-wide calling is incidental to other profitable services provided by an IXC and is an entree to those other profitable services. There is a return on the investment for toll-free county-wide calling.
- Assuming IXCs lose revenue as a result of providing toll-free intracounty calls, IXCs can come before the Commission and ask for relief.
- Given the use of the TAR Code Database by all carriers, no matter whether LECs or IXCs provide the service, all will receive complaints and the complaints should be spread in a fairly uniform relationship to a carrier's customer base.
- It is anticipated that LECs could develop a more efficient means of crediting access charges.
- The second, third, fourth, and sixth criteria listed in *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W 2d 151 (Tenn. Ct. App. 1992), militate in favor of a rulemaking, but there is insufficient argument and information to assess the remaining factors or to reach a conclusion on whether the issues present in this docket should be resolved in a rulemaking rather than a show cause proceeding.²⁴

The Commission adopted the ALJ's conclusion that IXCs should provide toll-free intracounty, interLATA calls to Tennessee consumers, the provision of a two year grace period, and the six-month waiver request period in its *Order* entered on July 15, 1994.²⁵ The Commission also agreed with many of the ALJ's findings. The Commission agreed that IXCs had failed to demonstrate through the presentation of material and substantial evidence that the Commission's directive is confiscatory and should not be imposed on IXCs. As did the ALJ, the Commission noted that IXCs are permitted to request rate relief from the Commission and cited a docket in which the Commission granted rate relief related to county-wide calling to AT&T.²⁶

²⁴ See *id.* at 11-19

²⁵ See *In re Show Cause Proceeding Against Certified IXCs and LECs to Provide Toll-Free County-Wide Calling*, Docket No. 93-07799, *Order*, 3, 17 (Jul 15, 1994) (attached hereto under **Tab 12**)

²⁶ See *id.* at 7 (citing *Tariff Filing by AT&T to Increase Rates for Private Line Services*, Docket No. 94-01035 (Jul 7, 1994))

The Commission also affirmed the finding of the ALJ that intracounty, interLATA service is not local and that IXC's can provide the service without a modification to their certificate of public convenience and necessity.²⁷ Echoing the concerns of the ALJ, the Commission found that requiring LECs to provide intracounty, interLATA calls was not in the best interests of Tennessee consumers because it would require SCB to apply for a waiver of the prohibition on providing interLATA calls, which would only inject delay and uncertainty into the docket, and because it would require the assignment of new NXXs thereby accelerating number exhaustion.²⁸ The Commission also found unpersuasive IXC's argument that their ability to recover costs through rate changes is constrained by competition. The Commission concluded that IXC's costs associated with changing their billing systems are ameliorated by the grace period provided for implementation, the waiver of access charges, and the existence of two billing methods for accomplishing toll-free, intracounty, interLATA call billing, that is, use of the TAR Code database and mileage bands.²⁹ Based on these findings and conclusion and others set forth in the order, the Commission ordered that "[a]ll IXC's providing intrastate service in Tennessee will provide interLATA intra-county calling toll-free to all Tennessee customers effective October 15, 1994."³⁰

The only findings and conclusions of the ALJ that the Commission disagreed with were related to the determination of whether a rulemaking was the more appropriate procedural vehicle to determine who is responsible for providing intracounty, interLATA calls. The Commission explicitly disagreed with the ALJ's finding that the fourth and sixth criteria in

²⁷ See *id.* at 8

²⁸ See *id.* at 11, 16.

²⁹ See *id.* at 13-14

³⁰ See *id.* at 17.

Tennessee Cable militate in favor of a rulemaking. The Commission concluded that it was engaged in ratemaking and that such action is not required to be done in a rulemaking.³¹

AT&T Communications of the South Central States, Inc., MCI Telecommunications Corporation, and Sprint Communications Company, L.P. (collectively "Petitioners") appealed the Commission's July 15, 1994 order. The Court of Appeals, Middle Division, issued its opinion of April 26, 1995. In its opinion, the Court concluded that the "direction of petitioners to render free long distance service between exchanges serving customers in a single county is not authorized by statute."³² The Court further concluded that the Commission's Final Order violated the Fifth Amendment of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Tennessee and made the following findings:

The order of the Commission "demands" or "takes" property, not for public use, but for private use of an individual at his demand. The utility is entitled to some compensation from the member of the public receiving the benefit of the demand

. . . . Just compensation means compensation from the public treasury or, in the case of utilities, from the member of the public receiving the benefit.³³

Based on these findings and conclusions the Court reversed and vacated the July 15, 1994 *Order* and remanded the docket for further proceedings as may be necessary and appropriate.

On September 1, 1995, Public Chapter 183 took effect. This legislation is codified at Section 65-21-114 of Tennessee Code Annotated and provides:

(a) After January 1, 1996, any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll free and shall not be billed to any customer.

(b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee Public Service Commission. Provided,

³¹ See *id* at 9-10

³² *AT&T Communications of the South Cent States, Inc v Cochran*, No 01A01-9409-BC-00427, 1995 WL 256662, *2 (Tenn Ct App May 3, 1995) (The slip opinion is stamped filed on April 26, 1995) (attached hereto under **Tab 13**)

³³ *Id* at *3

however, that this section shall not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.

(c) Nothing in this section is intended to modify or repeal the rate-making and telephone regulatory authority of the Tennessee Public Service Commission or the right of telephone companies to earn a fair rate of return.³⁴

On January 23, 1996, the Commission entered an order on BellSouth Telecommunications, Inc.'s ("BellSouth") application for a price regulation plan. In the order, the Commission directed BellSouth to petition the United States District Court for the District of Columbia to permit BellSouth to provide local exchange service across LATA boundaries.³⁵ On February 8, 1996, Public Law 104-104, the Telecommunications Act of 1996, became effective.³⁶ In light of the Telecommunications Act of 1996, on April 11, 1996, Judge Harold H. Greene of the United States District Court for the District of Columbia entered an order dismissing all pending motions as moot.³⁷

On May 17, 1996, the Commission issued an order in Docket No. 96-00918 directing all IXCs operating in Tennessee that "provide interstate service to customers located within the following twelve counties: Claiborne, Cumberland, Greene, Hawkins, Marion, Meigs, Montgomery, Polk, Roane, McNairy, Obion, Weakley, [to] appear and show cause why they should not be penalized pursuant to T.C.A. § 65-21-114."³⁸ In reaching this conclusion, the Commission found that the Consumer Services Division had received thirty-eight (38)

³⁴ 1995 Tenn Pub Acts 183 (attached hereto under **Tab 14**)

³⁵ See *In re Application of BellSouth Telecommunications, Inc d/b/a South Central Bell Telephone Company for a Price Regulation Plan*, Docket No 95-02614, *Order*, 5 (Jan 23, 1996) (attached hereto under **Tab 15**).

³⁶ See Telecommunications Act of 1996, Pub L No 104-104, 110 Stat. 56.

³⁷ See *United States v Western Elec Co*, 1996 U S Dist LEXIS 9293, at *7 (D.D.C Apr 11, 1996) (attached hereto under **Tab 16**).

³⁸ *In re Show Cause Proceeding Against Certified Inter-Exchange Carriers (AllNet Communications Service, Inc, AT&T Communications of the South Central States, Inc LDDS WorldCom, MCI Telecommunications Corp, Sprint Communications Co, and Wiltel, Inc) to Provide Toll Free County-Wide Calling*, Docket No 96-00918, *Order*, 2 (May 17, 1996) (attached hereto under **Tab 17**).

complaints since the enactment of Section 65-21-114 in regard to charges for calls completed by IXCs.³⁹

The Directors held a pre-hearing conference in Docket No. 96-00918 on November 26, 1996. Before the Directors were a motion in limine, in which Authority Staff acting as a party asserted that the Authority is without jurisdiction to determine whether Section 65-21-114 violates the United States or Tennessee constitutions, and a motion to dismiss, in which Petitioners asserted that the Authority lacked statutory authority to enforce Section 65-21-114 through a show cause proceeding.⁴⁰ Based on the motions and oral arguments, the Directors determined that they have express authority and jurisdiction to enforce Section 65-21-114, but are prevented by the Tennessee Supreme Court's decision in *Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995), from ruling on the constitutionality of Section 65-21-114.⁴¹

Petitioners filed a renewed petition for review of interlocutory rulings and application for immediate stay in the Tennessee Court of Appeals on January 29, 1997. The Court entered an order on March 4, 1997 noting that the Authority filed a response conceding that the Authority does not have jurisdiction to impose penalties under Section 65-4-120 of Tennessee Code Annotated and remanding the docket to the Authority with instructions to dismiss the proceeding for lack of jurisdiction.⁴² Based on this order, the Consumer Advocate filed a motion to dismiss

³⁹ See *id* at 1-2

⁴⁰ See *In re Show Cause Proceeding Against Certified Interexchange Carriers (AllNet Communications Service, Inc., AT&T Communications of the South Central States, Inc., LDDS WorldCom, MCI Telecommunications Corp., Sprint Communications Co., and Witel, Inc.) to Provide Toll Free County-Wide Calling*, Docket No. 96-00918, Order, 2 (January 28, 1997) (attached hereto under **Tab 18**)

⁴¹ See *id* at 3

⁴² *AT&T Communications of the S Cent States, Inc v Greer*, Appeal No. 01-A-01-9701-BC-00017, Order (Mar 4, 1997) (attached hereto under **Tab 19**)

on March 31, 1997.⁴³ At an Authority Conference on April 15, 1997, the Directors voted to grant the Consumer Advocate's motion and close the docket.⁴⁴

The Authority next addressed county-wide calling at the May 6, 1997 Authority Conference. Under miscellaneous business, the Directors unanimously voted to open a docket to investigate how to provide county-wide calling in the counties of Claiborne, Cumberland, Greene, Hawkins, Marion, Meigs, Montgomery, Polk, Roane, McNairy, Obion, and Weakly and to insure just compensation to the providers of such service. The Directors further voted to require staff to move as expeditiously as possible, but to report back to the Directors by no later than the first meeting in July.⁴⁵ On June 25, 1997, Eddie Roberson, Chief of the Utility Services Division, sent his report to the Directors. In the report, Mr. Roberson stated: "[A]ll certified interexchange carriers have informed us that they either have or plan to voluntarily provide toll-free county-wide calling in Tennessee by not billing for these calls. Interexchange carriers will modify their billing systems in order to suppress county-wide calling charges."⁴⁶ According to the report, the following companies agreed to provide toll-free county-wide calling by the following dates:

AT&T Communications of the South Central States
Sprint Communications

May 1, 1997
End of August, 1997

⁴³ The Consumer Advocate explained in its motion that the Authority conceded that it did not have jurisdiction because there was no violation of a rule or order. See *In re Show Cause Proceeding Against Certified Interexchange Carriers (AllNet Communications Service, Inc., AT&T Communications of the South Central States, Inc., LDDS WorldCom, MCI Telecommunications Corp., Sprint Communications Co., and Wiltel, Inc.) to Provide Toll Free County-Wide Calling*, Docket No. 96-00918, *Motion to Dismiss*, 1 (Mar. 31, 1997).

⁴⁴ See *In re Show Cause Proceeding Against Certified Interexchange Carriers (AllNet Communications Service, Inc., AT&T Communications of the South Central States, Inc., LDDS WorldCom, MCI Telecommunications Corp., Sprint Communications Co., and Wiltel, Inc.) to Provide Toll Free County-Wide Calling*, Docket No. 96-00918, *Order Granting Motion to Dismiss Nunc Pro Tunc* (Oct. 20, 1997) (attached hereto under **Tab 20**).

⁴⁵ Transcript of Proceedings, May 6, 1997, pp. 43-47 (Authority Conference). It appears that no docket number was ever assigned to this investigation.

⁴⁶ Memorandum from Eddie Roberson, Chief of Utility Services Division, to Chairman Lynn Greer, Director Sara Kyle, and Director Melvin Malone on Staff Report on the Status of County-Wide Calling in Tennessee, 1 (Jun. 25, 1997) (attached hereto under **Tab 20**). Per the memorandum, AT&T Communications of the South Central States will only offer free county-wide calling to business customers under one of its customized long distance calling plans. See *id.* at 2 n.2.

MCI Telecommunications
Frontier Communications
WilTel Network Services

Within the next 12 months
Since 1996
October, 1998⁴⁷

Mr. Roberson recommended that the Authority keep the docket open so that staff could continue to monitor county-wide calling compliance and file a final report after the companies implement the billing changes. He also recommended that the Authority issue a press release regarding the availability of county-wide calling and otherwise educate consumers.⁴⁸ At the July 1, 1997 Authority Conference, Mr. Roberson presented his report to the Directors. The Directors complimented Mr. Roberson's efforts, but no vote was taken.⁴⁹

The Attorney General issued an opinion on July 20, 2001 addressing the following question: "Is Tenn. Code Ann. § 65-21-114, in requiring all telephone calls placed between two points in the same county to be toll-free, constitutional as applied to interexchange or long distance carriers?"⁵⁰ The Attorney General provided the following qualified response: "While Tenn. Code Ann. § 65-21-114 is constitutional in most of its applications, it would be unconstitutional to apply this statute to a long distance telephone carrier under circumstances where the carrier does not receive reasonable remuneration for the service it is required to provide."⁵¹ The Attorney General cited Article I, Section 21 of the Constitution of the State of Tennessee and the Fourteenth Amendment to the United States Constitution in the opinion and described the constitutional problem that arises in counties dissected by LATA boundaries as follows:

As a result, in parts of these affected counties, a long distance carrier must be involved in completing a call to certain areas within the county. Since long

⁴⁷ *Id.* at 2 (footnote omitted).

⁴⁸ *See id.* at 2.

⁴⁹ Transcript of Proceedings, July 1, 2003, pp 18-23 (Authority Conference)

⁵⁰ *Constitutionality of Tenn. Code Ann. § 65-21-114 Concerning Countywide Telephone Calling*, Op. Tenn. Att'y Gen. 01-115, 1 (2001) (attached hereto under **Tab 22**).

⁵¹ *Id.*

distance calls are billed on a toll basis, the requirement of § 65-21-114 that such calls be toll free would mean that the long distance carrier would be required to complete these calls for no remuneration whatsoever. Many subscribers making calls within the county but across a LATA boundary would have no other long distance calls during a billing period, resulting in their long distance carrier's [sic] being required by this statute to render a service for free. This produces the constitutional problems with the statute.⁵²

Despite this conclusion, the Attorney General noted that the General Assembly or the Tennessee Regulatory Authority could devise a mechanism to provide compensation to interexchange carriers for completing intracounty, interLATA calls.⁵³

II. PROCEDURAL HISTORY OF THIS DOCKET

The Telecommunications Division received tariffs relating to county-wide calling from Citizens Telecommunications Company of the Volunteer State and Citizens Telecommunications Company of Tennessee (collectively "Citizens") on June 11, 2003. The tariffs provided:

To the extent that an originating or terminating exchange is split between two or more counties, only those stations located within the same county may be called without incurring toll charges. Many exchanges can be called to some degree on a toll-free intracounty basis, but not completely on a toll-free basis, i.e., the exchange is split between counties.

Countywide calls that terminate to a Local Exchange Carrier (LEC), CLEC, or Reseller that is not participating in County-Wide Calling (code not available in the TAR code database) will be rated at the appropriate toll charge.⁵⁴

During the July 7, 2003 Authority Conference, the Directors raised concerns over whether the tariffs comply with Section 65-21-114 and voted to suspend the tariffs for thirty days.⁵⁵ Citizens filed tariff revisions on July 16 and 30, 2003. The July 30, 2003 revisions provide:

County-wide calls originated by a [Citizens] customer which are carried by an IXC (Interexchange Carrier) via 1+ dialing and terminate to a customer of

⁵² *Id.* at 2

⁵³ *See id.* at 3

⁵⁴ *E.g., In re Citizens Telecommunications Company of the Volunteer State Tariff to Clarify Language – Tariff Number 2003592*, Docket No. 03-00410, Tariff No. 2003-592, Revisions to T.R.A. No. 2, section 2, third revised page 1, 2 1 Availability of Facilities (rec'd Jun. 11, 2003, filed Jun. 30, 2003)

⁵⁵ Transcript of Proceeding, Jul. 7, 2003, pp. 21-22 (Authority Conference)

another Local Exchange Company (LEC) or a Competitive Local Exchange Carrier (CLEC) that is not participating in County-wide Calling (code not available in the TAR code database) are rated and billed at the applicable toll charge. Any [Citizens] customer who is billed for an intra-county call of this type who notifies [Citizens] of the billing error will receive credit for the associated toll charges if [Citizens] is the billing agent for the IXC involved. At the time credit is issued [Citizens] will notify the TRA of the billing violation caused by noncompliance of the terminating LEC or CLEC so the TRA can take proper corrective action.⁵⁶

The Directors considered the revised tariffs at the August 4, 2003 Authority Conference. The Directors were not fully convinced that the revisions complied with Section 65-21-114, yet recognized certain industry-wide technical limitations. Based on these concerns and findings, the Directors voted to open a workshop “to gather information and input from the telecommunications industry related to preventing violations of Tenn. Code Ann. § 65-21-144,” appointed Director Ron Jones as the Moderator, and approved the tariffs conditioned on Citizens providing customers notice of their ability to receive a credit.⁵⁷ Pursuant to this order, Docket No. 03-00502 was opened.

On September 16, 2003, Director Jones, acting as moderator, issued a *Notice of Filing* in Docket No. 03-00502. Director Jones invited all facilities-based providers and resellers of telecommunications services certificated in the State of Tennessee to:

- Describe the manner in which you are able to provide telecommunications service in compliance with Tenn. Code Ann. § 65-21-114(a). If you do not currently take steps to ensure compliance with § 65-21-114(a), explain your reason for not doing so.

⁵⁶ E.g., *In re Citizens Telecommunications Company of the Volunteer State Tariff to Clarify Language – Tariff Number 2003592*, Docket No. 03-00410, Tariff No. 2003-592, Revisions to T.R.A. No. 2, section 2, third revised page 1, 2.1 Availability of Facilities (filed Jul. 30, 2003).

⁵⁷ *In re Citizens Telecommunications Company of the Volunteer State Tariff to Clarify Language – Tariff Number 2003592*, Docket No. 03-00410, *Order Conditionally Approving Tariff and Initiating “Workshop” on Preventing Violations of Tenn. Code Ann. § 65-21-114*, 2-3 (Sept. 5, 2003); *In re Citizens Telecommunications Company of Tennessee Tariff to Clarify Language – Tariff Number 2003593*, Docket No. 03-00411, *Order Conditionally Approving Tariff and Initiating “Workshop” on Preventing Violations of Tenn. Code Ann. § 65-21-114*, 2-3 (Sept. 8, 2003) (both orders attached hereto under **Tab 23**).

- Identify any technical, operational, administrative or other difficulties encountered when attempting to comply with Tenn. Code Ann. § 65-21-114(a).
- Provide a suggestion for how this workshop should proceed.⁵⁸

The following companies provided responses:

1-800-Reconex
 Access America
 Access Integrated Networks, Inc
 ACCXX Communications, LLC
 ACN Communications Services, Inc.
 Adelphia Business Solutions of Nashville, L.P.
 (TelCove)
 Adelphia Business Solutions Operations Inc
 (TelCove)
 Advances Tel, Inc
 Advantage Cellular Systems, Inc
 Aeneas Communications, Inc
 Alltel Communications, Inc
 American Long Distance Lines, Inc
 American Long Lines, Inc
 American Telephone Systems, Inc
 AmeriMex Communications
 Ardmore Telephone Company
 AT&T of the South Central States, LLC
 Bell Atlantic Communications, Inc d/b/a Verizon
 Long Distance
 Bellerud Communications, LLC
 BellSouth BSE
 BellSouth BSE, Inc.
 BellSouth Long Distance, Inc
 BellSouth Telecommunications, Inc
 Ben Lomand Communications, Inc
 Ben Lomand Rural Telephone Cooperative, Inc
 Broadwing Communications, LLC
 Brooks Fiber Communications of Tennessee, Inc
 BT Communications Sales LLC
 Business Discount Plan, Inc
 Business Telecom, Inc.
 CIMCO Communications, Inc
 Citizens Telecommunications Company of Tennessee,
 LLC
 Citizens Telecommunications Company of the
 Volunteer State, LLC
 Comcast Business Communications
 CommuniGroup
 Connect America Communications, Inc

Consolidated Communications Operator Services,
 Inc.
 Crockett Telephone Company
 CTC Long Distance Services, Inc
 Custom Teleconnect, Inc
 DeKalb Telephone Cooperative
 Dixie-Net
 eMeritus Communications
 Evercom Systems, Inc
 Express Connection Telephone Service
 Express Paging, Inc
 GANCOC, INC d/b/a American Dial Tone
 GE Business Productivity Solutions, Inc
 Globalcom, Inc
 Global Communication Inc. of America
 Global NAPs Gulf, Inc.
 Global Tel Link
 Granite Telecommunications, LLC
 GTC Telecom
 Highland Communications, Inc
 IDS Telecom
 Infone LLC
 Infonet Services Corporation
 Intelical Operator Services, Inc.
 Intrado Communications, Inc
 ITC^DeltaCom
 JirehCom, Inc
 Knology
 LDMI Telecommunications, Inc d/b/a LDMI
 Telecommunications also d/b/a FoneTel
 Level (3) Communications, LLC
 LoadPoint, LLC
 Long Distance Wholesale Club
 Loretto Telephone Company
 MCI WorldCom Communications, Inc
 MCI WorldCom Network Services, Inc.
 MCImetro Access Transmission Services, LLC
 McLeodUSA Telecommunications Services Inc
 Millennium Telecom
 Millington Telephone Company
 MountainNet Long Distance

⁵⁸ *In re Workshop to Gather Information from the Telecommunications Industry Related to Preventing Violations of Tenn Code Ann § 65-21-114*, Docket No 03-00502, Notice of Filing (Sept 16, 2003)

MountainNet Telephone Company
 National Telecom
 NetOne International
 NetSolutions, Inc
 Network Billing Systems
 Network Communications International Corp
 Network Telephone
 New Edge Networks, Inc
 NewSouth Communications
 Norstan Network Services
 North Central Telephone Cooperative
 NOW Communications, Inc.
 NuVox Communications, Inc
 NYNEX Long Distance Company d/b/a Verizon
 Enterprise Solutions
 OneStar Long Distance, Inc
 PAETEC Communications, Inc
 Primus Telecommunications, Inc.
 Qwest
 Qwest Communications Corporation
 Scott County Telephone Cooperative
 Skyline Telephone Membership Corporation
 SouthernNet, Inc d/b/a Telecom*USA
 Southwestern Bell Communications Services, Inc
 Sprint Communications Company L P (CLEC)
 Sprint Communications Company L.P (IXC)
 Talk America, Inc
 TDS Long Distance Corporation
 TDS Telecom
 Telelobe America, Inc
 Telescan Communications Solutions

Tennessee Telephone Service
 The Other Phone Company Inc
 Time Warner Telecom of the MidSouth, LLC
 TLX Communications, Inc.
 T-Netix Telecommunications Services, Inc
 TON Services, Inc (certificate cancelled 9/8/03 for
 nonpayment)
 Total Telephone Concepts, Inc
 Touch 1
 TTI National, Inc
 Twin Lakes Telephone Cooperative Corporation
 U.S South Communications, Inc
 U.S Telecom Long Distance, Inc
 U S TelePacific Corp d/b/a TelePacific
 Communications
 U-Dial of Tennessee, Inc
 United Stated Advanced Network, Inc
 United Telephone Co
 United Telephone Southeast, Inc
 Universal Access, Inc
 Universal Telecom
 US LEC of Tennessee
 UTC Long Distance
 Value-Added Communications, Inc.
 VoiceCom Telecommunications LLC
 West Kentucky Rural Telephone Cooperative
 Working Assets Funding Service, Inc d/b/a Working
 Assets Long Distance
 XO Tennessee, Inc.
 Z-Tel Communications

On October 13, 2003, Director Jones issued a *Notice of Workshop* scheduling a workshop meeting on November 7, 2003 from 1:00 p.m. until 5:00 p.m. Many providers participated in the workshop. At the conclusion of the meeting, Director Jones invited all interested providers to file written comments by November 17, 2003. Comments were filed by Time Warner Telecom of the MidSouth, L.P., BellSouth, United Telephone-Southeast, Inc., Sprint Communications Company, L.P., the Consumer Advocate and Protection Division, and ALLTEL Communications, Inc.

III. COMMENTS

A. COMMENTS FILED PURSUANT TO THE SEPTEMBER 26, 2003 *NOTICE OF FILING* AND PROVIDED DURING WORKSHOP

In the initial comments filed pursuant to the September 26, 2003 *Notice of Filing* and provided during the workshop meeting, the commenting entities provided a wide range of responses. Most carriers responded that they complied with Section 65-21-114 by using the TAR Code Database administered by BellSouth. According to the comments, carriers that participate in the TAR Code Database provide BellSouth updates of their customer information twice a month and BellSouth in turn provides the carriers updates of the entire database twice a month.⁵⁹ Carriers use the TAR Code Database when preparing customer bills. Specifically, carriers compare call records with the TAR Code Database and remove intracounty calls.⁶⁰ In those instances when a toll carrier carries an intracounty call that terminates outside the originator's local calling area, the toll carrier removes the call from the customer's bill using the TAR Code Database. Next, the LEC either provides the toll carrier a credit for access charges billed if requested to do so by the toll carrier or provides the toll carrier a bill for access charges that does not include charges for intracounty calls that terminate outside the originator's local calling area.⁶¹ Other carriers provided the following explanation for how they comply with Section 65-21-114:

- Provides customer credits upon request
- Compares optional daily usage filed ("ODUF") information with call routing tables
- Relies on underlying carrier to filter call information

⁵⁹ See Comments of BellSouth Telecommunications, Inc., Item 1, Page 2 of 2 (Sept 30, 2003), Transcript of Proceeding, November 7, 2003, pp 48, 96 (Workshop Meeting). There were some comments indicating that some carriers may receive weekly updates from BellSouth, but BellSouth could not confirm whether this was true. BellSouth did explain that companies may receive the database via mailed tapes, a private line connection, or the Internet. See Transcript of Proceeding, November 7, 2003, pp. 96-99 (Workshop Meeting).

⁶⁰ See Transcript of Proceeding, November 7, 2003, p 13 (Workshop Meeting), *Comments of BellSouth Telecommunications Related to Preventing Violations of T C A § 65-21-114*, 2 (Nov 17, 2003)

⁶¹ See Transcript of Proceeding, November 7, 2003, pp 13-15 (Workshop Meeting)

- Uses internally developed software that zero rates calls meeting certain mileage specifications
- Does not permit callers to complete intracounty calls that terminate outside the originator's local calling area
- Relies on LEC to not forward intracounty calls
- Manually inputs the originating NPA/NXX and the corresponding terminating NPA/NXX that are within the county-wide calling area into a billing system
- Relies on the "BellSouth Interconnection Unbundling and Resell Agreement" filed with TRA and defines the local calling area the same as BellSouth
- Compares county codes (GeoCodes)⁶²
- Uses multi-county calling packages
- Charges a flat rate with no long distance charges
- Uses a third-party vendor that processes call records
- Uses two-way internal trunks
- Defines the local calling area as the county
- Uses county look-up table based on NPA, NXX and LERG information to match counties called

Many commenters provided an explanation for why they do not currently comply with Section 65-21-114. The reasons included the following:

- Telephone cooperatives are not obligated to offer intracounty calling toll-free pursuant to Section 65-21-114.
- Customer owned coin operated telephone ("COCOT") service providers that provide services to inmates are not subject to Section 65-21-114.
- Carrier provides only collect calls from inmates.
- Underlying carrier unable to provide reseller with a cost effective method for flagging intracounty records.
- Underlying carrier refused to filter calls for wholesale customers.
- Underlying carrier does not provide customer account record exchange ("CARE") records.
- Underlying carrier charges for all calls.
- Carrier's underlying carrier is a company that is prohibited by federal law from providing county-wide service in a particular county. As a reseller of that service, the responding carrier is also exempt pursuant to Tenn. Code Ann. § 65-21-114(b).
- Carrier is a long distance service provider that is not subject to county-wide calling because it would not receive remuneration for intracounty calls and; therefore, the statute would be unconstitutional.

⁶² ITC^DeltaCom described the use of GeoCodes as follows "The originating and terminating NPA/NXX is used to retrieve the GeoCode from the tax package (the GeoCode being a number in SS-CCC-LLLL format where SS=State, CCC=County, and LLLL=City/Location) County codes are then compared, and if they are the same, the call is dropped and not billed" Comments of ITC^DeltaCom (Oct 1, 2003); see Transcript of Proceedings, November 7, 2003, pp 22-23, 33, 57 (Workshop Meeting) (Time Warner Telecom of the MidSouth, LLC, KMC Telecom and ITC^DeltaCom discussing Geo Codes)

- Carrier does not have presubscribed customers and relies on customers following instructions on phone or tent cards.
- Carrier sells only pre-paid phone cards.
- Carrier does not charge a separate rate for call completion and does not base pricing on local/long distance classifications. This is a carrier that provides concierge-type services.
- Carrier does not have the facilities to distinguish calls.
- Carrier is not providing service at this time.

The commenting providers also provided insight into some of the technical, operational, and administrative difficulties faced by carriers trying to comply with Section 65-21-114. Some of the comments included the following:

- TAR Code Database difficulties:
 - Not all carriers submit numbers to the Administrator.
 - Virtual NXX numbers may not be in the Database and when associated with an Internet service provider may result in very large bills.
 - A number of ILECs do not follow a uniform, consistent practice in terms of when and how their TAR Code files are updated.
 - Data may be stale as a result of new NPA/NXXs.
 - The TAR Code Database is expensive to use.
 - Initial development may require file format changes and the purchase of proprietary software to allow transmission of data to the TAR Code Administrator.⁶³
 - Internal system automation problems preclude the company from retrieving numbers from the TAR Code Database
- The burden is on IXC rather than the LECs. The LEC bills the IXC which bills the reseller. The reseller then has to credit the customers' bills.
- Ported numbers cause problems.
- The expense of recognizing intracounty calls on an NPA/NXX basis would be a true impediment to small competitors.
- Neither the TRA nor BellSouth was able to assist with associating counties and rate centers, which is necessary when an address is not associated with a phone number.
- Customers do not understand who is responsible for complying with the law.

⁶³ During the workshop meeting and in its November 17, 2003 comments, BellSouth stated that it was not aware of any proprietary software that must be purchased to interface with the TAR Code Database. See Transcript of Proceeding, November 7, 2003, p. 100 (Workshop Meeting), Comments of BellSouth Telecommunications, Inc., 6 (Nov. 17, 2003).

B. Alternatives Discussed During the Workshop Meeting

During the workshop meeting participants discussed the alternatives for ensuring compliance with Section 65-21-114 mentioned in the pre-filed comments and offered some new ideas as well. The alternatives discussed were to use the Local Exchange Routing Guide (“LERG”) or 911 databases to populate the TAR Code Database, require all carriers to populate the TAR Code Database, report complete NXX ranges to BellSouth rather than specific numbers, use GeoCodes or a similar service from a third-party vendor, use a competitively neutral party to administer the TAR Code Database, use mileage bands, provide LATA-wide extended area service (“EAS”), and encourage legislative action.

The option of using the LERG or 911 databases would not eliminate the TAR Code Database, but would provide a source for county information other than the LECs.⁶⁴ As to the LERG, carriers expressed concern over the integrity of the LERG data that would be fed into the TAR Code Database and the fact that the LERG data may be staler than current TAR Code Database data.⁶⁵ Further, companies noted that the LERG data is not sufficiently detailed in that it only provides the NXX,⁶⁶ although one carrier stated that LERG “6” may work because it contains a county field and a full ten digit NXX range.⁶⁷ As to the 911 database, there was some confusion on the detail of the data available in the 911 databases. One commenter suggested that the data only goes to the NXX level,⁶⁸ and another commented that the 911 databases contain all ten digits.⁶⁹

⁶⁴ See Transcript of Proceeding, November 7, 2003, pp 36, 47 (Workshop Meeting)

⁶⁵ See *id* at 36, 52

⁶⁶ See *id* at 38, 52

⁶⁷ See *id* at 50

⁶⁸ See *id* at 53

⁶⁹ See *id* at 67

Carriers also suggested that rather than require all carriers to use the TAR Code Database to bill calls, the Authority could simply require that all carriers send updates to BellSouth for it to use in populating the database.⁷⁰ Using this alternative would permit carriers to bill using any source and would ensure that those carriers that choose to use the TAR Code Database are able to access all number information. Time Warner Telecom of the Mid-South, LLC noted that it would incur additional costs if it were to begin participating in the TAR Code Database.⁷¹ KMC Telecom noted that it uses GeoCode data to bill its customers properly and to send updates to BellSouth, although it did mention that there is an internal cost associated with sorting the data for use in the TAR Code Database.⁷²

Millington Telephone Cooperative offered a one-time entry solution at the workshop meeting. Specifically, Arthur Chin the representative from Millington Telephone Company stated:

I'm from Millington Telephone. We're right beside Time-Warner in terms of our operation area. We're about ten miles north of them, and we serve Shelby County, Tipton County, and Mason. We have interexchanges in four counties, within the four counties, so we don't have the same type of problems that all of these other more foreign exchanges or the telephone company has.

We basically put nine entries into the TAR database from 000 to 999, all 10,000 numbers goes into the same county. For Time-Warner to comply, all they have to do is actually put in one entry (901) 478-0000 to 999, and they don't have to update ever. If they are going to be operating only in the Memphis, Shelby County area. I mean, that is like permanent. We never update our database. I mean, we only do it one time from the inception of the 911 because all of our customers are within -- I mean, certain exchanges are permanently in that particular county area.

So I mean, I think you just submit one file, one time only if you're going to be in the Memphis area, I think from here till the end of never.⁷³

⁷⁰ See *id* at 58-59.

⁷¹ See *id* at 37.

⁷² See *id* at 57.

⁷³ See *id* at 65.

One issue raised during the meeting in regard to this alternative that merits further consideration is how this solution would accommodate numbers that are ported into or outside of a county.⁷⁴

Another alternative that came out of the workshop is to require carriers to use an alternative database, such as GeoCodes, provided by a third-party.⁷⁵ None of the companies that use GeoCodes expressed dissatisfaction with the codes or their vendors;⁷⁶ however, those carriers that currently use the TAR Code Database Code did express certain reservations in regard to converting to GeoCodes. Specifically, BellSouth noted that it and other carriers have substantial investments in the TAR Code Database and would incur additional costs to convert to GeoCodes.⁷⁷

One carrier put forth the idea that a competitively neutral party should administer any common database or other solution and that party may not be BellSouth.⁷⁸ In support of its comments, the carrier noted that the use of the TAR Code Database administered by BellSouth began prior to the passage of the Telecommunications Act of 1996. The carrier suggests, that given the current competitive environment, an alternate administrator may be more appropriate.

Another alternative is to use mileage bands to rate calls. ITC^DeltaCom expressed a preference for mileage bands over other alternatives claiming that it is a “cleaner process.”⁷⁹ Other carriers were not as supportive. Sprint Communications Company, L.P. commented that as toll carriers move to flat-rate service offerings they may no longer maintain mileage band information in their billing systems.⁸⁰ Sprint Communications Company, L.P. also noted that

⁷⁴ See *id* at 65-69.

⁷⁵ See *id* at 37.

⁷⁶ The companies that mentioned that they used GeoCodes were Time Warner of the Mid-South, L.P., ITC^DeltaCom, and KMC Telecom. See *id* at 22, 33, 57.

⁷⁷ See *id* at 37-38.

⁷⁸ See *id* at 32, 41-42.

⁷⁹ See *id* at 73.

⁸⁰ See *id* at 75.

using mileage bands can cause a company to credit more toll than is required because a mileage band may extend beyond the county boundaries.⁸¹

The participants also discussed LATA-wide EAS.⁸² While this alternative sounds simple, it quickly became clear during the workshop meeting that there are certain issues related to this alternative that require further consideration. First, this alternative does not provide relief to those consumers that live in a county dissected by a LATA boundary.⁸³ Second, this alternative would still require that there be some centralized system with an independent, third-party administrator.⁸⁴ Third, there is not an EAS network in place to carry LATA-wide local calling.⁸⁵ Fourth, using this alternative would require price regulated companies to recover revenues currently generated for toll and access charges from another source.⁸⁶

A final alternative expressed was for the carriers to agree on an alternative, perhaps LATA-wide EAS, and to take that agreement to the General Assembly.⁸⁷ One carrier commented that it would rather go before this agency.⁸⁸

C. NOVEMBER 17, 2003 COMMENTS

Time Warner Telecom of the MidSouth, L.P. ("Time Warner") submitted that the TAR Code Database is not the only solution and mentioned the adoption of GeoCodes and the regulation of retail/wholesale prices as alternative solutions. Time Warner further noted that the burden to implement the solution should not be more onerous on one group of carriers than on another.⁸⁹

⁸¹ See *id* at 76-77

⁸² See *id* at 78.

⁸³ See *id* at 79.

⁸⁴ See *id* at 78, 83.

⁸⁵ See *id* at 85.

⁸⁶ See *id* at 76

⁸⁷ See *id* at 82.

⁸⁸ See *id*

⁸⁹ Comments of Time Warner Telecom of the MidSouth, L.P., 1 (Nov 17, 2003)

Citizens Telecommunications Company of the Volunteer State and Citizens Telecommunications Company of Tennessee (“Citizens”) asserted that in order to fully comply with Section 65-21-114 the LECs of the original and terminating number and the IXC must share a database. Changing from the TAR Code Database is neither rational nor feasible given that the majority of carriers use the TAR Code Database, which is tested, inexpensive, and an industry standard. Further, Citizens commented that it appears that if the TAR Code Database were mandated, BellSouth could develop an automated means to calculate access credits and thereby eliminate the frustration of calculating the amount of access credits due. Citizens also questioned the accuracy of the GeoCode databases used by some carriers. Lastly, Citizens noted that there appears to be a problem with calls that transit the Telecommunications Relay Service being billed despite the originating and terminating customers being in the same county and stated that it is currently discussing the problem with MCI.⁹⁰

Sprint Communications Company, L.P. and United Telephone-Southeast, Inc. (collectively “Sprint”) also commented that the TAR Code Database could meet the needs of carriers as long as all carriers participate. As to those carriers that use GeoCode databases and where the local calling area is equal to the county boundary, Sprint supports allowing one-time or as-needed updates to the TAR Code Database to minimize costs to those carriers.⁹¹

The Consumer Advocate and Protection Division (“CAPD”) stated that the industry should recognize a standard database to ensure that calls are properly billed. Also, the CAPD stressed the importance of the Authority considering counties dissected by LATA boundaries and

⁹⁰ Comments of Citizens Telecommunications Company of the Volunteer State and Citizens Telecommunications Company of Tennessee (Nov 17, 2003).

⁹¹ Comments of Communications Company, L.P. and United Telephone-Southeast, Inc (Nov 17, 2003)

ensuring compensation to IXC's consistent with the Attorney General's July 20, 2001 Opinion No. 01-115.⁹²

According to ALLTEL Communications, Inc. ("ALLTEL"), the Authority cannot require IXC's to comply with Section 65-21-114 unless IXC's are compensated for completing such calls. Further, ALLTEL submits that even if the Authority could devise a compensation mechanism, compliance would be very expensive and likely outweigh any benefits of county-wide calling. Given these assertions, ALLTEL requests that the Authority exempt IXC's from the requirements of Section 65-21-114.⁹³

BellSouth provided extensive comments in response to the Moderator's invitation. BellSouth supports the use of the TAR Code Database and asserts that, although carriers may use other methods for preparing their bills, industry-wide updating of the TAR Code Database is required to prevent gaps in the process. BellSouth expressly opposes abandonment of the TAR Code Database, but is willing to turn over the administration of the database to a third-party or the Authority.⁹⁴ BellSouth also recognizes that any solution will require companies to incur some costs, but asserts that "the fifty or so companies participating in the TAR Code solution should not have to incur additional expense to adopt another method of providing county-wide calling simply because a few service providers have elected not to participate in the [TAR Code Database]."⁹⁵ BellSouth finally concludes that there is no better alternative than the TAR Code Database for providing toll-free, county-wide calling.⁹⁶

⁹² Comments of the Consumer Advocate and Protection Division (Nov 17, 2003)

⁹³ Comments of ALLTEL Communications, Inc (Nov 18, 2003)

⁹⁴ Comments of BellSouth Telecommunications, Inc , 1-2, 5 (Nov 17, 2003).

⁹⁵ *Id* at 6

⁹⁶ *Id* at 7

D. RECENT CONSUMER SERVICES CORRESPONDENCE

Recently the Consumer Services and External Affairs Division has received several responses from carriers in regard to county-wide calling complaints.⁹⁷ While county-wide calling complaints and responses thereto are not new to the Consumer Services and External Affairs Division, a brief summary of a few such responses may be helpful to this discussion.

On October 31, 2003, ACCXX Communications, LLC ("ACCXX") responded to a county-wide related complaint. In its response, ACCXX asserts that it has had to cease providing service in Obion County because of Section 65-21-114. ACCXX explains that Williams Communications bills ACCXX for intracounty calls, but ACCXX must credit the end user's account for such calls pursuant to Section 65-21-114.

On November 20, 2003, U.S. Telecom Long Distance, Inc. ("U.S. Telecom") responded to a county-wide calling complaint. In the response, U.S. Telecom stated that it explained to the complaining customer that it is charged by the underlying carrier for intracounty calls; per the Attorney General, Section 65-21-114 is unconstitutional as applied to toll-carriers; and if the consumer did not wish to incur charges for intracounty calls, the consumer should choose a different carrier. According to the response, the customer switched to BellSouth.

MountaiNet responded to a county-wide calling complaint on November 17, 2003. MountaiNet explained that it is a reseller of Qwest long distance services and that the LECs are passing intracounty calls to Qwest which is then passing the calls to MountaiNet. MountaiNet asserts that it will continue to credit consumers' bills upon requests even though Qwest has refused to credit MountaiNet's account claiming that it is not required to do so. The relief requested by MountaiNet is that the law be amended or enforced.

⁹⁷ The three responses that will be summarized are attached hereto under **Tab 24**

IV. CONCLUSIONS AND RECOMMENDATIONS

Over fifteen years has passed since the Commission first tried to obtain the benefits of an expanded local calling area for consumers and still we hear arguments for why carriers cannot or will not bring those benefits to consumers. The time has come to bring resolution to these issues and to provide consumers the benefits to which they are entitled by statute, yet the resolution is for the most part no clearer today than it was fifteen years ago. Absent further legislation on this subject, the Authority must do its duty and mandate the means through which carriers must comply with Section 65-21-114. Leaving the means to the industry, despite many good intentions, has not fully accomplished the goals of the Commission, the Authority, or the General Assembly.

Two issues have long been resolved and there has been no reason given to compel the Authority to reevaluate these issues. Specifically, the Commission long ago determined that in those instances where an intracounty call crosses LATA boundaries IXCs are better situated to complete the calls.⁹⁸ Many of the reasons given justifying these decisions still hold true today. Additionally, in Docket No. 93-07799, the ALJ concluded and the Commission affirmed that an intracounty call that terminates outside of the end users local calling area is not local.⁹⁹ No justification has been given for revisiting this issue. Moreover, this issue is somewhat of a red herring as the statute requires that intracounty calls be toll-free regardless of whether this agency or a provider labels that call as local or toll.

⁹⁸ See *In re Show Cause Proceeding Against Certified IXCs and LECs to Provide Toll-Free County-Wide Calling*, Docket No 93-07799, Order, 3, 17 (Jul 15, 1994) (attached hereto under **Tab 12**), *In re Implementation of County Seat Calling Plans for Calls Across LATA Boundaries*, Docket No U-88-7596, Order, 1-2 (Nov 15, 1988) (attached hereto under **Tab 4**)

⁹⁹ See *In re Show Cause Proceeding Against Certified IXCs and LECs to Provide Toll-Free County-Wide Calling*, Docket No 93-07799, Order, 8 (Jul 15, 1994) (attached hereto under **Tab 12**).

Despite decisions on these two issues, other issues related to the provision of toll-free county-wide calling for all consumers remain unresolved. As expressed earlier, all carriers have not been able to agree on a system that addresses these issues and accomplishes the goals of Section 65-21-114. Therefore, this task must be taken up by the Authority. In order to accomplish this task, it is my recommendation that the Authority convene two dockets, a rulemaking and a generic contested case.

As a starting point for the rulemaking, the Authority staff should be directed to draft a proposed rule for filing with the Secretary of State's Office.¹⁰⁰ The rule should establish a mechanism to be used by all carriers for the purpose of fulfilling the goals of Section 65-21-114. When deciding which mechanism the Authority should mandate, the Authority Staff should consider the movement in Tennessee toward a competitive environment and this agency's responsibility to permit such competition.¹⁰¹ Further, Authority Staff should consider all alternatives raised by the workshop participants and the costs that carriers will incur to implement the mechanism. If it is determined that the best approach involves the TAR Code Database or some other central database, Authority Staff should address how the database will be populated, who will administer the database, the frequency of updates to the administrator, and the frequency of updates to carriers.

Authority Staff should also review the need to require LECs to waive access charges. If it is determined that such charges should be waived, the proposed rule should set forth the manner in which this will occur. For instance, at what point in the billing process will the access charges be identified? In addition, if it is determined that the bill and credit system currently used by several LECs to waive access charges should be adopted, the Authority Staff should

¹⁰⁰ See Tenn. Code Ann. § 4-5-203(b), (c) (1998)

¹⁰¹ See Tenn. Code Ann. § 65-4-123 (Supp. 2003)

consider the need for establishing due dates for the submission of credit requests and the payment of credits.

The proposed rule should also identify the types of carriers that are responsible for ensuring that customers are not billed toll charges for intracounty calls. For instance, the Authority should provide a clear statement of who will be held responsible for complying with Section 65-21-114 so that carriers, such as those that provide inmate services, are fully aware of their obligations. Further, the proposed rule should address the relationship between underlying carriers and resellers.

It is also my recommendation that the Authority convene a generic contested case that will concurrently proceed with the rulemaking docket. The purpose of this generic docket is to address the constitutional application of Section 65-21-114. Toll carriers continue to assert that Section 65-21-114 as applied to them is unconstitutional because it requires that they provide a service without reasonable remuneration. Such assertions should come as no surprise given the 1995 opinion of the Court of Appeals and the 2001 opinion of the Tennessee Attorney General.¹⁰² Despite these two opinions and the conclusory assertions of toll carriers, the issue of whether carriers actually receive reasonable remuneration has never been determined in an evidentiary proceeding.¹⁰³ Failure to address this issue in such a proceeding in the near future will only continue the current proclamation of unconstitutional application and the resulting perceived inability of the Authority to enforce Section 65-21-114.

¹⁰² *AT&T Communications of the South Cent States, Inc v Cochran*, No 01A01-9409-BC-00427, 1995 WL 256662, *3 (Tenn Ct. App May 3, 1995) (The slip opinion is stamped filed on April 26, 1995) (attached hereto under **Tab 13**), *Constitutionality of Tenn Code Ann § 65-21-114 Concerning Countywide Telephone Calling*, Op Tenn Att'y Gen 01-115, 1 (2001) (attached hereto under **Tab 22**).

¹⁰³ The Attorney General seems to have relied on the assumptions that all long distance calls are billed as toll and there are no fees assessed in addition to toll charges *Constitutionality of Tenn Code Ann § 65-21-114 Concerning Countywide Telephone Calling*, Op Tenn. Att'y Gen 01-115, 2 (2001) (attached hereto under **Tab 22**).

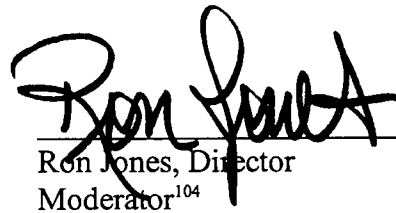
IT IS THEREFORE RECOMMENDED:

1) The Tennessee Regulatory Authority should open a rulemaking docket for the purpose of establishing a mechanism and related regulations to ensure compliance with Section 65-21-114 of Tennessee Code Annotated. Authority Staff should draft a proposed rule as described herein and publish such rule through the sending of a notice as described in Section 4-5-203(c) within sixty (60) days following the adoption of this recommendation at an Authority Conference.

2) The Tennessee Regulatory Authority should open a contested case docket for the purpose of determining whether toll carriers receive reasonable remuneration when terminating intracounty calls that terminate outside the originating caller's local calling area. In order to move this docket forward, any carrier that wishes to participate in this docket should file a petition to intervene and state, if applicable, whether the carrier receives reasonable remuneration for terminating calls that terminate outside the originating caller's local calling area within fourteen (14) days of the adoption of this recommendation at an Authority Conference. Any carrier that responds that it does not receive reasonable remuneration should provide a detailed explanation of its contention.

3) Any party that wishes to file comments on this *Report on Workshop Meeting Held November 7, 2003 and Recommendation of Moderator* shall do so by **Friday, December 19, 2003**.

4) The Moderator presents this *Report on Workshop Meeting Held November 7, 2003 and Recommendation of Moderator* to the panel for consideration at an Authority Conference to be scheduled by the publishing of a final conference agenda.



Ron Jones, Director
Moderator¹⁰⁴

¹⁰⁴ See *In re Citizens Telecommunications Company of the Volunteer State Tariff to Clarify Language – Tariff Number 2003592*, Docket No 03-00410, *Order Conditionally Approving Tariff and Initiating “Workshop” on Preventing Violations of Tenn Code Ann § 65-21-114*, 3 (Sept 5, 2003) (appointing Director Ron Jones as the moderator)